The BAR ASSOCIATION BULLETIN

Entered as second-class matter, April 13, 1926, at the Postoffice at Los Angeles, California, under the Act of March 3, 1879

Volume 3, Number 18 MAY 17, 1928 5c a copy: $1 a year

Official Publication of the Los Angeles Bar Association, Los Angeles, Cal.

In This Issue

MONTHLY MEETING OF ASSOCIATION
Thursday, May 17, 1928
See Page 18 for Particulars

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

The BAR ASSOCIATION BULLETIN

VOL. 3 MAY 17, 1928 No. 18

Published the first and third Thursdays of each month by the Los Angeles Bar Association and devoted to the interests of the Association.

Office: 535 Title Insurance Building, Los Angeles
Fifth and Spring Streets
Telephone MEtropolitan 2000, Station 162

LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

Equitable Conversion in California

By ORVILLE P. COCKERILL, *Dean of the School of Law, University of North Dakota; Visiting Professor, 1927-1928, University of Southern California.*

(Written for the *Southern California Law Review;* delivered in substance as an address before the Los Angeles Bar Association, April 19, 1928.)

The doctrine of equitable conversion was stated by Sir Thomas Sewell in Fletcher v. Ashburner,[1] as follows: ". . . money directed to be employed in the purchase of land and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties may make land money or money land."[2]

It may be stated broadly to be well established that when an executory contract for the purchase and sale of real property has been executed with a binding obligation on the part of the vendor to sell and upon the vendee to pay the purchase price, the conversion is immediately effected. The English courts have long regarded the doctrine of equitable conversion as a fixed rule of equity, and have consistently treated the vendee under an executory contract for the purchase of real property as being the equitable owner of the land itself.[3]

The rule as applied and interpreted by the great English chancellors has been widely accepted by the American judges in determining the position in equity of the vendor and vendee in an executory contract for the sale of real property.[4]

The adoption of the rule owes much to the influence of the maxim that equity regards that as done which ought to be done. The reason for this is that the vendee has the right in equity to compel specific performance of the contract.[5] He may compel the vendor to convey the land sold under contract.

The doctrine as applied to the testamentary disposition of property has also had a wide-reaching effect both in England and America. Frequent application of the doctrine is found in cases involving wills where the testator has directed the sale or purchase of land for the benefit of designated beneficiaries. When there is an order to purchase land for a beneficiary under the will, the gift is treated from the time of the testator's death as a devise of land; but if land is directed to be sold and the proceeds distributed to designated persons, this is a legacy.[6]

If after the execution of a contract for the purchase and sale of land the vendee

---

[1] 1 Bro. C. C. 497, 28 Eng. Reprint, 1259 (1779).

[2] *Cf.* ". . . it is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted." Lord Justice Bowen in Attorney General v. Hubbuck, 13 Q. B. D. 275, 289 (1884). "A change of property from real into personal and from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity." BISPHAM, EQUITY (9th ed.), §307.

[3] Fletcher v. Ashburner, *supra* note 1. Ward v. Arch, 15 Sims 389, 60 Eng. Reprint, 670 (1846).

[4] Peter v. Beverly, 10 Pet. 532, 9 L. Ed. 522 (U. S. 1836); Meekins v. Branning Mfg. Co., 224 Fed. 202 (D. C. N. C. 1915); Salisbury v. Slade, 160 N. Y. 278, 54 N. E. 741 (1899); 13 C. J. 858.

[5] Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, 97 N. E. 43 (1911); Clapp v. Tower, 11 N. D. 556, 93 N. W. 862 (1903); "The only reason why a contract by the owner of land for the sale of it to another operates to effect a conversion, is that a court of equity will compel him specifically to perform his contract. A court of equity considers that as done which ought to be done, and which it will compel to be done. Conversion as arising from a contract to sell is merely and exclusively the consequence of the application by a court of equity of the doctrine of specific performance; where there can be no specific performance there can be no conversion." Vice-Chancellor Kendersley in Haynes v. Haynes, 1 Dr. & Sm. 426, 451, 62 Eng. Reprint, 442 (1861).

[6] Stewart v. Griffith, 217 U. S. 323, 30 Sup. Ct. 528 (1909); Ingraham v. Chandler, 179 Iowa, 304, 161 N. W. 434 (1917); 13 C. J. 882.

dies, his heirs can claim the land under the contract, and require payment therefor to be made out of the personal estate.[7] On the other hand, in the event of the vendor's death, his personal representatives can require conveyance of the land to be made by the heirs, and the personal representatives are entitled to the purchase money.[8]

The doctrine of equitable conversion is also applicable to partnership real property to the extent that upon dissolution said real property is treated as personalty.[9] The doctrine has recently been invoked in testing the validity of a succession tax on land within the State, the land having been devised by a will executed by a person domiciled in another State.[10]

No attempt will be made to review the authorities generally, but a consideration of the cases in California will be attempted in order to determine to what extent the doctrine has been invoked in a single jurisdiction.

By way of caution it should be noted that the laws of California are codified and that some of the results reached through equitable conversion in other jurisdictions may be reached here under statute law. And by way of further caution one must keep in mind that, as stated by Dean Pound:[11] "When we speak of conversion we are not describing a condition of the property for all purposes with respect to everybody, but are giving a name to a situation resulting from the application of equitable doctrines to the state of facts between certain parties."

For example, it is perfectly clear that when land is changed into money by sheriff's sale of the property of a debtor, the owner of the land is entitled to the surplus funds, if any, because he was the owner at the time of the sale, and for no other reason; and it is confusing when courts speak of "equitable conversion" under such a state of facts, when it is evident that they mean "changed into."

Again if A dies owning real estate, it is clear his interest descends to his heir. If the property is subsequently sold, the funds are payable to his heir, not because of any fiction, but because the heir is the owner. The sale was the sale of his property in so far as he is entitled to the proceeds and not on any theory of equitable conversion. This result is reached by the application of legal principles, yet some courts purport to reach the conclusion on the grounds of equitable conversion.

In like manner, in the case of a naked authority or discretion to sell in a will, the interest of the heir or devisee is real property until the sale is made, and so far as either is entitled to the proceeds, he is entitled as owner at the time of the sale, irrespective of any doctrine of equitable conversion. The interest of the heir or devisee is bound by a judgment entered before the sale, and the sale taking place, the judgment creditor is entitled to payment out of the proceeds because he had a lien on the land at the time of the sale, which lien was discharged by the sale. The interest of the heir or devisee dying before the sale, being real estate, would descend to his heir. The doctrine of equitable conversion cannot be properly applied in determining the rights in the above examples.

By Will

The doctrine of equitable conversion by will which is so generally announced in other jurisdictions is fully recognized in California. In fact, the Civil Code[12] provides that "When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death."

---

[7] *Supra* note 6.

[8] Bubb's Case, Freeman, Chancery Cases, 38 (1678); 1 Ames, Cases Equity Jurisdiction, 194, note 3.

[9] Darby v. Darby, 3 Dreu, (H. C. of Ch.) 495 (1856); Darrows v. Calkins, 154 N. Y. 503, 49 N. E. 61 (1897); Bates v. Babcock, 95 Cal. 479, 30 Pac. 605 (1892).

[10] In Re Sanford, 188 Iowa, 833, 175 N. W. 506 (1919); Land Title & Trust Co. v. So. Car. Tax Com., 131 S. C. 192, 126 S. E. 189 (1925); (1926) 36 Yale L. J. 283.

[11] Pound, *The Progress of the Law* (1923) 33 Harv. L. Rev. 831. Cf., Stone, *Equitable Conversion by Contract* (1913) 13 Cal. L. Rev. 369. It is thus apparent that a result is reached commonly explained by the doctrine of equitable conversion, which nevertheless may be reached quite independently of it;" McMurray, *Review of Recent Cases* (1919) 7 Cal. L. Rev. 442, 454: "The doctrine of equitable conversion seems to be rarely invoked in California; the tendency seems to be toward applying legal doctrines rather than equitable ones to the treatment of contracts for the sale of land;" and see note by J. C. S.—J. J. P. (1920) 8 Cal. L. Rev. 197: "The California rule is not influenced by this equitable legerdemain. Emphasis is laid on the contractual relation of the parties. Indeed, it seems to have been the intention of the code makers to do away with the theory of equitable ownership."

[12] Cal. Civ. Code, §1338.

To constitute a conversion of real property into personalty, or personalty into real property there must be a clear and imperative direction in the will.[13] If any discretion, or choice, is left to the executor no equitable conversion will take place, because no duty to make the change rests upon him.[14] Such obligation to sell may be implied, but it must be a necessary implication from directions given in the will by the testator.[15] The fact that the entire estate of a testator, both real and personal, is to be distributed as one fund does not raise any presumption of an equitable conversion.[16]

While the statute briefly but fully makes equitable conversion apply to positive directions in a will, it may, perhaps, be of value to glance at some of the decisions of the California courts as illustrating the application of the doctrine of equitable conversion.

In Bank of Ukiah v. Rice,[17] a testator had devised to his widow a life estate in the real property of which he died seised. He made no devise of the land after the termination of the life estate. He did, however, direct the executor to sell the same after the termination of the life estate and to divide the proceeds equally among his four children. One of these children mortgaged his interest to the plaintiff bank. The bank by foreclosure proceedings had become the owner of the mortgagor's interest and brought this action to have the real property partitioned. The action was dismissed and on appeal the dismissal was affirmed. In the opinion affirming the dismissal it was stated: "The effect of this direction in the will was to convert the land into personalty (Civ. Code, sec. 1338); and the beneficiaries may therefore be deemed legatees rather than devisees. . . . The land is not devised to them, and even if it should be conceded that until a sale is had by the executor as directed by the decree the legal title will remain in them as the heirs at law of the testator . . . it is merely a formal and barren title without any estate or interest in the land, or right to possession, and is, therefore, insufficient to sustain an action for partition by them as heirs at law of the testator."[18] The action failed because the bank and defendants were not co-tenants, which they would have been, had the court refused to apply the doctrine of equitable conversion.

In the application of the doctrine of equitable conversion, if money is directed by a will to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may, if he elects so to do, cause a reconversion of such property and take it in its original state. In other words, where a testator directs land to be sold and the proceeds to be distributed among several beneficiaries, such beneficiaries may, by unanimous agreement before the sale has taken place, elect to take the land instead of its proceeds, and by so doing, reconvert it into real estate, and thus change a legacy into a devise.

The doctrine of reconversion was applied in Re Loyd's Estate.[19] A testator who died domiciled in California had owned real and personal property in California and lands in Iowa. He directed his executors to sell the Iowa land and divide the proceeds among his twelve children. In a suit in California, to which the widow and the twelve children were parties, one Charles Hicks had established that he was a duly acknowledged illegitimate child of the testator, and that as such, under the laws of California, although not mentioned in the will, he was entitled to take two thirty-ninths of the whole estate "wherever situated." Under the laws of Iowa, on the other hand, there being a valid will, Hicks was excluded by the gift to the twelve legitimate children. The widow and legitimate children agreed to hold the Iowa land as land and so notified the executors, who then refused to sell. The Superior Court of California ordered the executors to sell the land and removed them for disobedience of the order. This order was reversed by the Supreme Court. In reaching the conclusion that Hicks had no interest in the Iowa land the California court said: ". . . it will be assumed that an equitable conversion was

[13]Estate of Pforr, 144 Cal. 121, 77 Pac. 825 (1904); Janes v. Throckmorton, 57 Cal. 368 (1881); Estate of Spreckles, 5 Cof. Prob. Dec. 311 (1910); Kidwell v. Brummagim, 32 Cal. 436 (1867); Crouse v. Peterson, 130 Cal. 169, 62 Pac. 475 (1900); 6 CAL. JUR. 533.

[14]*Supra* note 13.

[15]Estate of Pforr, *supra* note 13; Estate of Walkerly, 108 Cal. 627, 41 Pac. 772 (1895).

[16]Crouse v. Peterson, 130 Cal. 169, 62 Pac. 475 (1900).

[17]143 Cal. 265, 76 Pac. 1020 (1904).

[18]143 Cal. 265, 270-271.

[19]175 Cal. 699, 167 Pac. 157 (1917).

worked by virtue of the language of the testator's will, for this assumption, as we shall see, is borne out by the law of Iowa. Nevertheless, it was not an actual conversion but a constructive conversion merely, and all the devisees of this land—the twelve children and the widow—all the parties, in short, who were recognized by the will—elected to take the property in kind. . . . These, then, are the facts. and under them not the slightest doubt can be entertained but that the parties in interest and owners of this land under the will of the deceased effectuated a reconversion which wholly superseded the equitable conversion. . . ."[20]

The court concedes that under the will the testator had converted the Iowa land into personalty and that, were they construing the will alone, the proceeds from the Iowa land would be personalty, Charles Hicks would be entitled to two thirty-ninths thereof, and the order of the Superior Court directing the executors to sell would be a valid order, but holds that when all the beneficiaries under the will decided not to sell the Iowa land their action re-converted it into real property. The law of Iowa, therefore, governs the distribution of the land and Hicks, not being entitled under the Iowa law to a share in the estate, must lose.

One other instance of the application of the doctrine to wills may be noted. In Re Gracey's Estate,[21] the question before the court concerned the validity of an olographic codicil. Robert Gracey, who had died domiciled in Pennsylvania, had made certain gifts to Merced City, California, for the use of its public library. The property thus disposed of had been left to said Gracey by the will of Sarah Jane Thursby, who had died domiciled in California. In the course of administration of the Thursby estate it had become necessary to sell some of the real property. It was deemed for the best interests of the estate to sell the whole of the real property. It is the surplus of the proceeds from this sale that is to be administered under Robert Gracey's codicil. The court said: "The primary question for determination is whether an equitable conversion of the real estate in Merced County to personal property took place upon the death of either Sarah Jane Thursby or of Robert Gracey. It is conceded by the respondents that if it be held, contrary to the determination of the trial court, that the California estate of which Robert Gracey died seised was, in contemplation of law, personal property at the time of his death it would follow that all of said California estate should be delivered to the Pennsylvania executor to be distributed in accordance with the laws of Pennsylvania with the inevitable declaration there that the said codicil was void."[22]

It was rightly held that the money, derived from the sale of the California land, in the hands of the executor of Robert Gracey's will, was to be treated as real property; that the codicil under the California law was valid and would govern in the distribution of said money as land in California. It was of no consequence that at the time of Robert Gracey's death all his California property was money, the court saying that equity would treat it as land.

It is confidently submitted that the doctrine of equitable conversion, as followed generally in other Anglo-American jurisdictions, is applied with like results in California when conversion has been effected by will.[23]

By Contract

Equitable conversion by contract presents a different situation in California. The Civil Code[24] provides that a contract in which A covenants to sell land to B may, if equitable, be specifically enforced. It does not declare, however, that the contract works an equitable conversion into personalty of the land to be conveyed. It becomes necessary, therefore, to examine the cases to see whether the California courts reach the same results as the courts in other jurisdictions do in cases where the latter courts apply to the doctrine; and to determine whether the California courts reach these results via the equitable conversion doctrine.

An examination of all the cases in which

[20]175 Cal. 699, 705-706.

[21]200 Cal. 482, 253 Pac. 921 (1927).

[22]200 Cal. at 487, 488. 253 Pac. at 924.

[23]Estate of Phelps, 182 Cal. 752, 19 Pac. 17 (1920); Estate of Hills, 176 Cal. 232, 168 Pac. 20 (1917); Estate of Loyd, 175 Cal. 699, 167 Pac. 157 (1917); Estate of Pforr, 144 Cal. 121, 77 Pac. 825 (1904); Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020 (1914); Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225 (1896); In Re Walkerly, 108 Cal. 627, 41 Pac. 772 (1895); Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091 (1891).

[24]Cal. Civ. Code, §3384, providing: ". . . the specific performance of an obligation may be compelled."

equitable conversion is considered would make it necessary to consider separately several groups of cases. Here, however, only those cases applying the doctrine generally, those considering the rights of creditors of the vendee in the subject matter of the contract, and finally those wherein the risk of loss is an issue will be considered.

The doctrine was fully recognized and equitably applied in Re Dwyer's Estate.[25] Lelia Bonner Dwyer bequeathed to her husband the residue of her personal estate and then devised all her real estate to certain trustees to maintain the J. M. Bonner Home, a home for aged and infirm men. At the time of making her will, Mrs. Dwyer owned certain real property in Pasadena, California. Three months prior to her death she contracted in writing to sell this property to a Mr. Carr for $100,000. Carr tendered payment under the terms of the contract and demanded conveyance. Mrs. Dwyer refused to convey. Carr sued for specific performance of the contract. While this action was pending Mrs. Dwyer died. Carr then dismissed the first action and brought a similar suit against the administrator with the will annexed. A judgment for specific performance was rendered in favor of Carr.[26]

The contest in this case is between the heirs at law of the residuary legatee and the trustees of the J. M. Bonner Memorial Home, to whom all real estate of which the testatrix died seised was devised. If the real property covered by Carr's contract was converted into personal property by the contract of sale the proceeds belong to the heirs at law of the residuary legatee, but if it retained its character as real property at the time of Mrs. Dwyer's death the proceeds would go to the trustees of the Home. The proceeds from Carr's contract were given to the heirs at law. In applying the doctrine of equitable conversion the court said: "The only right which Mrs. Dwyer had under the sale was a right to the proceeds thereof which were at her death a portion of her personal estate and fell into the residuary clause of her will, and to which the respondents as her heirs at law were entitled."[27] The opinion affirms that a contract for the sale of land, such as Carr's, works a conversion. The vendor's interest thereafter is in the unpaid purchase price and is treated as personalty, while the purchaser's interest is in the land and is treated as realty. It was further held that section 1301 of the California Civil Code[28] did not change the effect of the contract to convey.

The doctrine has been invoked in adjudicating the rights of parties to the proceeds of an insurance policy, although it is doubtful whether the case really called for its application. In Hawes v. Lathrop,[29] the plaintiff had conveyed to the defendants, as trustees, a tract of land with a building thereon, for the purpose of establishing and maintaining a school. The defendants made an addition to the building and caused the whole to be insured for two thousand dollars. The building was destroyed by fire and the loss was paid to the trustees. There was a provision in the trust deed to the effect that if the design to establish and maintain a school should prove unsuccessful, the trustees should so declare, and thereupon the title to the property should revert to the plaintiff. After the fire the trustees did so declare, and also reconveyed the premises to the plaintiff. The question is, whether the money, from the insurance policy, paid to the defendants became, in equity, the property of the plaintiff upon the reconveyance of the premises to him by the trustees. The money was held to be real property so that by the reconveyance of the trust estate, by the defendants to the plaintiff, the title to the proceeds had become vested in the reversioner, the plaintiff.

Another case of interest where the doctrine was applied is Los Angeles Trust & Savings Bank v. Bortenstein.[30] Bortenstein, the defendant, had been the owner and mortgagor of certain property in the city of Los Angeles. By reason of the city's tortious acts, the property was partially detroyed or extinguished. The defendant had sued the city and recovered $12,500 damages. The mortgagee is now seeking this fund under a foreclosure proceeding.

---

[25] 159 Cal. 664, 115 Pac. 235 (1910).

[26] Carr v. Horwell, 154 Cal. 372, 97 Pac. 885 (1908).

[27] 159 Cal. 664, 676, 115 Pac. 235, 240 (1911).

[28] Cal. Civ. Code, §1301, provides: "An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors if the same had passed by succession."

[29] 38 Cal. 493 (1869).

[30] 47 Cal. App. 421, 190 Pac. 850 (1920).

Whether necessary to the decision or not the opinion contains this language: "Therefore, the money so awarded by the court as damages to the realty must be treated, in equity, as the land itself."[31]

It follows from a consideration of the above cases that, given a valid, specifically enforceable contract, whether it is a formal written one or one implied by law, equitable conversion is deemed to exist from the time of its origin. If the purchaser performs all the conditions precedent which under the contract entitle him to a conveyance, he will be deemed to be the owner of the land and the seller to be the owner of the purchase money. The fact that the vendor refuses to perform his part and make conveyance cannot affect the status or rights of the parties as to the property.[32] The purchaser out of possession may recover the rental value of the land.[33] In the announcement of the general doctrine of equitable conversion the California court has, in the main, followed the courts of other jurisdictions.

What are the rights of the creditors of the vendee? Is the interest of the vendee in the land one upon which a judgment is a lien, which may be attached, and upon which execution may be levied? The cases dealing with this subject will now be considered.

In the other jurisdictions the authorities are in open conflict on the effect of a judgment against the vendee when he has an executory contract to purchase land on which partial payment has been made. In several jurisdictions the courts have held that a judgment debtor's equitable interest in real property arising by virtue of an executory contract of purchase thereof, is subject to the lien of a judgment rendered against him.[34] A contrary view has been taken by a few courts. These courts hold that the lien of a judgment does not attach to the judgment debtor's interest arising from a contract of purchase.[35] The California courts have taken the latter view.[36] The question is really one of statutory interpretation.

The California decisions are consistent. This makes it unnecessary to consider the cases at length. In Belieu v. Power,[37] the plaintiff had entered into a contract to purchase certain real property. He paid half of the purchase price and took possession. About three months later he filed a declaration of a homestead on the property. The defendant had obtained judgment against the plaintiff before the filing of the declaration of homestead. The court said: "This appeal involves the single question whether a judgment lien attaches to the equitable interest in real property acquired by a vendee under an ordinary contract to purchase the property,—the vendee having paid a portion of the purchase price and entered into possession. . . . While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment,—real property owned by the debtor at the time of docketing and real property that he may afterwards acquire. While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien. That a mere equitable interest in real property acquired under a contract of purchase and sale is not such ownership as is contemplated by section 671 was clearly decided in the early history of the State."[38]

The court grounds the decision squarely on the statute as it had been interpreted in the earlier cases. The most that can be said about the statute and decisions is that if they do not include equitable conversion they in no way reject the doctrine in its general application.

The third group of cases to be considered deal with the risk of loss where there is a valid specifically enforceable contract for the sale and purchase of land. Under the doctrine of equitable conversion the purchaser, upon the signing of the contract,

---

[31] 147 Cal. App. at 424, 190 Pac. at 852.

[32] In Re Dwyer's Estate, 159 Cal. 664, 115 Pac. 235 (1911); Swain v. Burnette, 76 Cal. 299, 18 Pac. 394 (1888); Heinlein v. Martin, 53 Cal. 321 (1879); Fish v. Fowlie, 58 Cal. 373 (1881).

[33] Swain v. Burnette, *supra* note 32.

[34] Fridley v. Munson, 194 N. W. 840, 30 A. L. R. 501, 512 (S. D. 1923).

[35] *Supra* note 34, 30 A. L. R. at 517.

[36] Poindexter v. Los Angeles Stone Co., 60 Cal. App. 686, 214 Pac. 241 (1923); People ex rel. Ford v. Irvine, 14 Cal. 428 (1859); Belieu v. Power, 54 Cal. App. 244, 201 Pac. 620 (1921).

[37] 54 Cal. App. 244, 201 Pac. 620 (1921).

[38] 54 Cal. App. 244, 245, 247. Cal. Code Civ. Proc., §671, then read: ". . . from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor in the county . . . owned by him at the time, or which he may afterwards acquire. . . ." See the present Cal. Code Civ. Proc., §674.

becomes the equitable owner of the land. Equity from the moment the contract is binding gives the vendee the entire benefits of any rise in value of the land, of subsequent improvements, and of any other advantages that may accrue to the estate.[39] If the vendee has the right to the increase in value, why should he not assume any liability for the decrease in value? Especially should this be true if the vendee be let into possession, as in that case he is the person who should primarily see that there is no loss to the property. By the great weight of authority the vendee does assume the risk of loss.[40]

The California cases to be considered under "risk of loss" present many difficulties. A limited number of these cases may be said to support the general rule that loss falls on the vendee. A greater number, however, at least in so far as the language of the court is concerned, reject in toto the general rule as to loss.

The case of Owens v. Pomona Land & Water Company[41] is often cited in support of the rule that the loss falls on the vendee. Here the defendant contracted to convey to the plaintiff certain land and shares in an irrigation company which entitled him to a certain amount of water. The plaintiff paid part of the price, took possession and improved the land. The irrigation ditches were fed by artesian wells, which at the time the contract was made and for five years thereafter furnished sufficient water but partially failed the following season. The plaintiff sued to rescind the contract. In affirming a dismissal of the plaintiff's action by the trial court, the Supreme Court by inference admitted that there was a loss and that this loss should be borne by the vendee, when it said: "If this part of the consideration for the plaintiff's obligation failed in any degree, the failure was due to no fault of the defendant, and so was not a ground of rescission."[42]

---

[39]Howard v. Throckmorton, 48 Cal. 482 (1874); Hawkins v. Rodgers, 91 Or. 483, 179 Pac. 563 (1919); Lytle v. Scottish American Mortgage Co., 122 Ga. 458, 50 S. E. 402 (1905).

[40]"Considering how much has been made of the matter since Langdell (Brief Survey of Equity Jurisdiction, 60 *ff*), there is really very little authority against the doctrine of equity as to risk of loss. Of the cases that have been cited as contra, two, Thompson v. Gould, 20 Pick. (Mass.) 134 (1838), and Gould v. Murch, 70 Me. 288 (1879), were oral contracts unenforceable because of the Statute of Frauds, and the actions were at law; in two more, Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796 (1900) (containing, by the way, a dictum in favor of the equity doctrine), and Good v. Jarrard, 93 S. C. 229, 76 S. E. 698 (1912), the vendor-purchaser relation had not attached at the time of the loss because conditions precedent remained unfulfilled; in two more, Wells v. Calnan, 107 Mass. 514 (1871), Powell v. Dayton Co., 12 Ore. 488, 8 Pac. 544 (1885), 14 Ore. 488, 8 Pac. 544 (1885), 14 Ore. 356, 12 Pac. 665 (1887), 16 Ore. 33, 16 Pac. 863 (1888), the action was brought at law by the vendor. In none of these cases, was the equitable doctrine as to risk of loss in any wise involved. In the first four, the purchaser could not have been compelled to take regardless of the loss. In the last two, when vendor sued at law for a breach, he could not claim that purchaser was equitable owner. For the rest, Cutliff v. McAually, 88 Ala. 507, 512, 7 So. 331 (1889), is not even a strong dictum. Davidson v. Insurance Co., 71 Ia. 532, 534, 32 N. W. 514 (1887), was a question of construction of an insurance policy; Kares v. Covell, 180 Mass. 206, 62 N. E. 244 (1902), and Banty v. Kuhworth, 1 Mont. 133, 136 (1869), were actions at law, and in Banty v. Kuhworth plaintiff did not even show a breach at law on the part of the vendor. The one case thoroughly in point on this side is Wilson v. Clark, 60 N. H. 352 (1880), a suit in equity by purchaser. But this case relies on Thompson v. Gould without any discussion and without noting that the contract there was unenforceable in equity and did not raise the question which it is assumed was decided. In Kares v. Covell, 180 Mass. 206, 62 N. E. 244 (1902), after a bond for a deed an incumbrance was imposed by operation of law. The court decided the case as one of construction of a covenant to "convey free of incumbrances," holding it to mean free of incumbrances at the time of conveyance. It says expressly that the cases as to equitable ownership are inapplicable to such a contract. Compare Sanborn, J., in Nixon v. Mann, 190 Fed. 913, 921 (1911), and cases there cited, showing that the same result would be reached under such a covenant by courts which adopt the doctrine of equitable ownership. Although the language of the Massachusetts cases is against the prevailing doctrine, something more decisive than Kares v. Covell or the statement in Thompson v. Gould that where the contract was not enforceable in equity the court at law could not recognize the doctrine of equitable ownership, is required to commit the court to rejection of a long-settled theory of courts of equity or of a consequence thereof sustained by the overwhelming weight of Anglo-American authority. It should be remembered, moreover, that Thompson v. Gould was decided in 1838, and that because of the narrowly limited equity jurisdiction in that State and the tardy course of legislation with respect thereto, and consequent judicial caution in applying equitable doctrines, the older decisions in Massachusetts are 'exceedingly misleading as authorities upon the powers and doctrines of equity in other states.' 1 POMEROY, EQUITY JURISPRUDENCE, 312." Pound, *The Progress of the Law* (1920), 33 HARV. L. REV. 813, 827, n. 72.

[41]131 Cal. 530, 63 Pac. 850, 64 Pac. 253 (1901).

[42]131 Cal. 530, 546.

The general rule that the loss falls upon the vendee in possession was, moreover, clearly stated in McCarty v. Wilson.[43]. The plaintiff, as executor, brought suit for specific performance of a contract to purchase certain real property belonging to the estate. The defense was that the defendant was excused from performance by the fact that the property had suffered a ten per cent depreciation in value by reason of a flood and that under section 1689 of the California Civil Code[44] he had the right to rescind. In accord with the general Anglo-American rule the court stated: "Bearing in mind that prior to the injury to the property defendant was in equity the owner of the land; that he was unquestionably entitled to the possession of the land under the contract with the estate, and that he had actually gone upon the land with men and teams and done about $1,700 worth of grading, we have no doubt that the risk of loss was upon him."[45]

If the matter were closed by these cases it could be confidently asserted that our court has followed the beaten path made by the majority of the American courts and that the risk of loss is on the vendee. But a short fifteen months before the Supreme Court had stated the rule in the McCarty case, supra, the District Court of Appeal had said in La Chance v. Brown:[46] "When there exists an executory contract for the sale and conveyance of real property, and improvements which constituted a material part of the consideration have been destroyed, the loss falls upon the vendor, and the vendee has a right to rescind the contract."[47] The language is dictum, for it was found that the plaintiff and defendant had by mutual consent abandoned the contract of sale.

The court, however, in support of the dictum in the La Chance case cited Conlin v. Osborn.[48] The latter case was an action by the vendee to rescind a contract whereby he agreed to purchase certain real property in the city of San Francisco and to recover a deposit of ten thousand dollars made thereon. Soon after the signing of the contract the buildings on the property were destroyed by fire. The vendee was allowed to rescind and to recover the deposit. In affirming this holding the court said: "Appellant's counsel cites numerous authorities to the proposition that loss due to the destruction of buildings by fire in a case like this falls upon the vendee. Undoubtedly there is authority in some jurisdictions for such doctrine, most of the cases depending upon Paine v. Meller, 6 Ves. Jr. 349. Typical American cases upon the matter are Brewer v. Herbert, 30 Md. 301 [96 Am. Dec. 582] and Snyder v. Murdock, 51 Mo. 175. In California, however, this rule has not been followed; at least not in recent years. Smith v. Phoenix Ins. Co., 91 Cal. 330 [27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191], cited by appellant, does not support his theory. While it was there stated that *a vendee in possession* of land may sometimes maintain an equitable title to it under his executory contract as against the vendor's legal title, the chief justice delivering the opinion of the court in that case said: 'There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for—viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract, in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold.' This language is followed by an analysis of the apparently conflicting decisions on this subject, and the adoption of the rule announced in Wells v. Calnan, 107 Mass. 514 [9 Am. Rep. 65], that the destruction by fire of buildings on property in the vendor's possession prior to the date fixed for the payment of the purchase price and the conveyance of the title, defeats the

(Continued on page 27)

[43]184 Cal. 194, 193 Pac. 578 (1920).

[44]Cal. Civ. Code, §1689: "A party to a contract may rescind the same in the following cases only: . . . 4. If such consideration, before it is rendered to him, fails in a material respect, from any cause. . . ."

[45]184 Cal. 194, 200, 193 Pac. 578, 580 (1920).

[46]41 Cal. App. 500, 183 Pac. 216 (1919).

[47]At 504, 183 Pac. at 217 (1919).

[48]161 Cal. 659, 120 Pac. 755 (1911).

Proposed Official

BAR ASSOCIATION BUILDING

On Flower Street (between Sixth and Seventh Streets)

For Information

PHONE MR. J. L. ELKINS

TUcker 1384

The President's Page

Fellow Members,
Los Angeles Bar Association:

I assume that you are more interested in learning of the actual work and activities of your Association than in hearing general observations from your officers.

ASSOCIATION MEETING THURSDAY, MAY 17

This meeting will be unique in that the program will be handled and presented by the Women Lawyers Club. The speakers and the subjects selected warrant me in predicting that we shall be both instructed and entertained, as some of the speeches will be on interesting legal questions presented by specialists, some will be in lighter vein, and two of the speakers who are not members of the profession will address us on subjects outside of the law. The women members of the bar have been most loyal to our Association, against considerable odds they have established themselves in the profession, and this meeting will enable the Association to accord them well deserved, although belated, recognition individually and as a group. Unusual interest in this meeting is being shown by prominent club women and I trust you will make early reservations.

COMMITTEE ACTIVITIES

This year will develop most earnest work by our committees. No unnecessary gestures are indulged in. They were selected with care and because of peculiar fitness for the work assigned; no meeting of a committee is held unless there is particular work to be done; and regular meetings are held and full minutes are kept when there is something requiring a committee's attention. Every committee meeting is called through the secretary of the Association, and the minutes go to and are carefully studied by the Master Committee and by your president.

The Master Committee meets twice a month, and largely because of its personnel, ability to absorb work, vision and general capability, has already in a short space of time demonstrated the necessity and value of such a co-ordinating agency. It is relieving the Board of Trustees of some of its work, and will go still further and act as a sort of liaison unit in the efforts of this Association and the various State Bar sections.

THE JUDICIAL CAMPAIGN COMMITTEE

As you know, it is composed of Norman Bailie, chairman; Lawrence L. Larrabee, secretary; and Mattison B. Jones, all members of your Board of Trustees. Headquarters have been established, a proper accounting system installed, and an organization is being perfected, which will assure the Association and the public of a dignified but forceful campaign for those candidates whom you endorse for judicial office.

I wonder if many of the members of the Association realize the unselfish work performed by members of that committee, and also by the other committees, or the sacrifice in time and energy, and the financial loss borne for all of us by the members delegated to these tasks. I never lose heart in this job, but I wonder why we who are your selections for this or that office must write or appeal more than once for some small contribution of time or money. I sometimes think that the characteristic above noted explains much of the public's criticism of our delays and procrastinations. Letters, postcards, etc., all cost money and effort, and I should like to see the members respond promptly and react favorably or unfavorably to communications. If you are just happily satisfied—all right. If you have a kick—all right. But when we must be just left in the dark, it is not right. If you have passed up something, such as a contribution or a communication, please attend to it.

YOUR OFFICERS

Your officers and the members of your Board of Trustees work hard. I am not inclined to brag about it, but it is well for you to realize the facts. I am trying to let you see just what this organization is attempting to do and how it goes about it. With 2,500 members (and, by the way, we have an increasing membership), we have a problem similar to that of a large corporation, but our officers, trustees and committeemen work for love. That is not so easy for 300 or more days in the year. The hardest work necessarily falls on your president, and many hours nearly every day are devoted to *your* work with the same speed

and effort as would be accorded well paying clients—with this difference, that your work comes first. Your trustees, if they have no special meetings, come together every Thursday for a meeting that lasts from one and a half hours to three hours. In addition, they have other duties. The president and the vice-presidents are continually asked to address meetings of lawyers and public groups on questions pertaining to the bar, the administration of justice, and other topics, and perform additional duties. The correspondence of the president, both by letter and telephone, is voluminous, and I think it is safe to say that any member of the bar not only can reach your officers without the slightest delay, but two days are an unusual lapse of time between a letter and a reply. You should know all these things, for how otherwise can we who are temporarily responsible for the conduct of affairs judge the effect of our efforts or the value to you of our endeavors. If you do not know what is being done or attempted, we can not fairly judge your response or lack of response. Years ago for five or six years I served as chairman of the Legal Ethics Committee and during all that time was wholly uninformed as to any of the other activities of the Association. That was typical of conditions then, and doubtless was in part due to my failure to inquire. We are now making known to all of you the details of the operation of your business and we are seeing to it that serious committee labors are recognized and effective disposition made of their reports. Any other data or information will be furnished you on telephone request from you or your secretaries.

To illustrate some of the Association's efforts, I, as your president, was asked to address the Hollywood Chapter of the Knights of Columbus, and I spoke to several hundred members largely on the subject of our plebiscite. It has never been my pleasure to talk to a more friendly, fair-minded and responsive group and I left the meeting feeling that they welcomed the opportunity of following our recommendation as to judicial candidates. Similar word can be given to other groups by all of you as the opportunity presents.

Our relations with the bar associations in other cities in this county are most congenial, and the activities of those associations are in line with our own.

For the next issue I expect to ask our junior vice-president, Guy R. Crump, to fill this page with whatever message he may wish to deliver.

I should like to know how many members read this page anyhow. I have a suspicion at times that your president does not reach many readers, but I have no way of knowing and so hope enough read it to justify the expenditure of the effort involved. A large attendance at meetings would tend to convince me that the members give some attention to this page.

ADDITIONAL 1928 COMMITTEE ASSIGNMENTS

The following appointments have been made by President Hubert T. Morrow since the last publication in the BULLETIN of committee assignments:

ARBITRATION COMMITTEE

Jas. G. Scarborough ..... *Chairman*
Waldo M. York ..... *Vice-Chairman*
Henry M. Lee ..... *Secretary*

Samuel Poorman
David R. Faries
Thos. A. Berkebile
Jesse F. Waterman
Paul M. Gregg
H. L. Carnahan

YOUNG LAWYERS—ATTENTION

A Young Lawyers' Section of the Los Angeles Bar Association will organize and hold its first meeting on Thursday, May 24, 1928, at 6 o'clock P. M., on the eighth floor of the Chamber of Commerce Building. Dinner One Dollar.

All lawyers who have been admitted to practice since May, 1925, are urged to attend and "get organized."

Hubert T. Morrow, president of the Los Angeles Bar Association, will speak. Matters of particular interest to the young lawyers will be discussed. No dues or initiation fees charged. Make reservations at office of R. H. F. Variel, Jr., secretary of the Bar Association, 687 I. H. Hellman Building, TUcker 1384 or VAndike 5701.

PERSONAL COMMENTS

The Bulletin Committee has suggested that space in the BULLETIN *be given to personal items of interest relating to members of the Association. The editor welcomes this suggestion and will appreciate the assistance of attorneys who will mail to the* BULLETIN *office for publication personal comments concerning fellow-members of the Association.*

The items need not all be of a professional nature. If a lawyer goes fishing, somebody might like to hear how many fish he caught. If he is appointed to serve on some civic committee or accepts an invitation to address a woman's club, the Bar Association ought to know about it.

LOS ANGELES BAR ASSOCIATION MONTHLY MEETING AND DINNER

BANQUET HALL

CHAMBER OF COMMERCE

1151 SOUTH BROADWAY

Thursday, May 17; 6.00 P. M.

A program both instructive and interesting will be furnished by the Women Lawyers of the Association, Mrs. Edna Covert Plummer, president of the Women Lawyers Club, presiding.

The following addresses will be heard:

Mrs. Clara Shortridge Foltz, first woman admitted to practice in California. Subject: "Reminiscent of the Pioneer Woman Lawyer."

Miss Elizabeth Kenney. Subject: "Highlights on Inheritance Tax Laws."

Mrs. J. F. Mead, past president of the Woman's Club of Hollywood and world-traveled lecturer. Subject: "Europe—Twenty-five Years After."

Miss May D. Lahey, referee of Probate Court, Department 2. Subject: "Man, Know Thy Heirs."

Miss Lloy Galpin, vice-president of Business and Professional Women's Club. Subject: "Woman in Business and Industry."

Musical selections will be rendered by Miss Georgiana Strauss, mezzo-soprano, formerly of the Metropolitan Opera, and Miss Gertrude Peterson, harpist.

Reception Committee: Six past presidents of the Women Lawyers Club—Miss Florence Bischoff, Mrs. Mab Copeland Lineman, Miss Flora Belle Nelson, Miss Josephine Stevenson, Miss Caroline Kellogg and Miss Constance Leitch; also Miss Vere Radir Norton, Miss Florence Woodhead and Mrs. Winifred M. Ellis.

Guests of members are welcome. Informal. Dinner, $1.50. Prompt reservations are requested.

R. H. F. VARIEL, JR., *Secretary.*
VAndike 5701.

PROGRAM COMMITTEE
Joe Crider, Jr., *Chairman;*
John W. Hart, *Vice-Chairman;*
Kimpton Ellis, *Secretary;*
Kenyon F. Lee,
Walter E. Burke.

The BULLETIN *can be made financially successful only through increased revenue from additional advertisements. Members of the Bar Association are urged, from the standpoint of loyalty to the organization, to aid the publication in procuring advertisements, by suggesting to those who deal in any manner with the legal profession, that they avail themselves of the pages of the* BULLETIN *as a most effective medium to convey messages to the attorneys of Los Angeles county.*

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the* BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.

THE CAMPAIGN FUND--CARDS AND CONTRIBUTIONS

The Judiciary Campaign Committee wishes to inform the members of the Association that the cards received by members from the Committee acknowledging the receipt of their contributions to the campaign fund were donated by Hovis-Baker Company of 122 West 3d Street, Los Angeles, and to express its thanks and appreciation to that company for the contribution.

The Committee still has a large number of these handsome cards and members of the Association may obtain copies by forwarding their contributions to the campaign fund, provided they reach the offices of the Committee in the I. W. Hellman Building before the supply of cards is exhausted. No member of the Association should be without one of these cards.

Amendments to the By-Laws of Los Angeles Bar Association

The following amendments to the By-Laws were adopted by Los Angeles Bar Association at the regular meeting held April 19, 1928:

I. Subdivisions (b), (c), (d) and (e) of Section 3 of Article VIII were amended to read as follows:

"(b) To prepare and mail to each member of the Association such data, together with a ballot containing the names of all candidates for election or appointment. Each ballot shall be arranged so as to permit the voter to express his opinion as to which candidates are 'QUALIFIED' and which candidates, if any, are 'NOT QUALIFIED' for the particular office to which they seek election or appointment, and so as to permit the voter to indicate that he has no opinion as to the qualifications of any candidate. The time of mailing ballots and the time when ballots must be returned in order to be counted and all details respecting the time and manner of voting, the counting of ballots and the conduct of the plebiscite (except as herein specifically set forth) shall be determined and fixed by the Board of Trustees.

"(c) That candidate for an office whose percentage of 'QUALIFIED' votes of the total votes expressing an opinion as to his qualifications, is highest of the percentages of the candidates for such office, shall be named by the Association as the candidate endorsed, in the ensuing primary and general elections; or for appointment, as the case may be; provided, however, that no candidate shall be endorsed by the Association unless his 'QUALIFIED' votes shall be at least twice as many as his 'NOT QUALIFIED' votes, nor unless at least forty per cent of the voters voting in the plebiscite shall express an opinion (that is to say, either a 'QUALIFIED' vote or a 'NOT QUALIFIED' vote) concerning such candidate.

"(d) The Board of Trustees may order a further plebiscite taken as to any office or offices when a prior plebiscite shall have failed to result in the endorsement of a candidate or candidates therefor, or in the event of the defeat of the candidate of the Association in a primary election, or in case of a tie vote, or for other good cause.

"(e) The Association, through its Board of Trustees, shall conduct a campaign in the ensuing primary and general elections in favor of all candidates endorsed for election and shall recommend all candidates endorsed for appointment. It may also, in the discretion of the Board of Trustees, make a campaign, through its Board of Trustees, in opposition to any or all candidates who are voted 'NOT QUALIFIED' by a majority of the voters who vote on the candidate in the plebiscite. 'NO OPINION' votes shall not be counted in determining whether a candidate is 'QUALIFIED' or 'NOT QUALIFIED.'"

Subdivision (f) of Section 3, Article VIII, was repealed.

II. Article VIII was further amended by the addition of Section 15, which reads as follows:

"Section 15. A committee on arbitration, which shall consist of nine (9) members, or such number as the Board of Trustees may from time to time provide, to which committee, or to any member or members thereof who may be designated by the chairman of the committee, disputes or differences between attorneys, relative to (a) professional conduct, (b) breach of the code of ethics, (c) the amount, division or payment of fees, may be submitted; to the end that such disputes may be arbitrated and settled without publicity and without recourse to the courts.

"The committee shall make its own rules of procedure, and may provide for an arbitration or hearing by or before one or more members of the committee. The committee shall conduct its proceedings as informally and expeditiously as it shall deem consistent with the rights of those whose interests are involved."

Attendance Honor Roll

Regular attendance at the monthly meetings of the Bar Association is a sound manifestation of loyalty to the organization and interest in its activities. It is felt that special mention of those having the best record of attendance is called for.

The following list is composed of members, with the exception of officers, who have been present at every meeting to date during the present Bar Association year, and of members who have been present at every meeting except one. An asterisk before a name indicates a perfect record of attendance.

The list is not quite complete, as it was made up from reservation cards sent in prior to the meetings, and does not include the names of those who came to the meetings without having made reservations. The editor will appreciate being informed of corrections and additions.

The roll will appear in the BULLETIN each month. It is hoped that the list at the end of the year will still be lengthy. Will you not do your part to keep it so?

G. W. Adams
Robert J. Adcock
Judge William T. Aggeler
H. D. Allison
E. Neal Ames
Judge Thos. L. Ambrose
Will Anderson
Claude Andrews
Lorrin Andrews
*Judge Harry R. Archbald
Ella M. F. Atchley
Robert E. Austin

Walter R. Bacon
*Arthur G. Baker
Angelo L. Baldwin
C. A. Ballreich
Charles E. Beardsley
L. V. Beaulieu
Judge Daniel Beecher
Tracy C. Becker
Thomas A. Berkebile
C. O. Bettys
*John E. Biby
Judge Edward T. Bishop
*Florence M. Bischoff
Paul Blackwood
E. H. Blanche
Judge Charles L. Bogue
Edward Burton
J. M. Bowen
*Judge Fletcher Bowron
*B. J. Bradner
H. L. Breidenbach
James V. Brewer
Joseph Harris Brewer
H. F. Bridges
*J. Calvin Brown
Ray W. Bruce
Willard W. Burgess
Judge Chas. S. Burnell
Eli Bush
Judge Guy F. Bush

*C. F. Cable
Carl E. Cameron
John W. Carrigan
Charles Cattern
Harry W. Chase
Mabel Clausen
William T. Coffin
Huber A. Collins
*Paul Conway
Grant B. Cooper
*Norval J. Cooper
*Robert M. Cordill
Thos. H. Cornett
Wm. E. Cort
Bernard Cotter
Judge Elliott Craig
Judge Gavin W. Craig
Judge Hugh J. Crawford
William Crop

*N. D. Papa Dakis
James E. Davis
Raphael Dechter
*G. C. DeGarmo
*Charles De Le Fond
A. S. De Santis
Judge Walter J. Desmond
Leonard A. Diether
Thos. J. Dixon
John F. Dockweile
Miles Dodge
Clyde Doyle
H. M. Duval
John L. Dyer

Judge Douglas L. Edmonds
*J. L. Elkins
*Kimpton Ellis
Ralph W. Evans

D. E. Farr
George E. Farrand
Harold A. Fendler
J. R. Files
Judge Frank Finlayson
Guy W. Finney
Walter R. Flint
Clara Shortridge Foltz
Edmund Fortune
Hugh Foster
*W. Turney Fox
A. W. Francisco
*W. Joseph Ford
Amos Friedman
Judge Chas. W. Fricke
Martin C. Frincke, Jr.
*John M. Fulton
R. M. Fulton

*Judge R. Morgan Galbreth
*J. M. Gammon
Herbert Ganahl
Edward D. Garratt
Leo B. George
Walter S. Goen
*Richard C Goodspeed
Bryce P. Gibbs
John Gillham
H. S. Goldman
Jules C. Goldstone
*Judge Thomas C. Gould
Louise G. Guernsey

Judge Chas. E. Haas
Kendra K. Hamilton
Leland S. Hamilton

Wilbert C. Hamilton
*Percy V. Hammon
Wm. J. Hanlon
Joseph Hansen
Judge Carlos S. Hardy
Judge Lester E. Hardy
*Albert B. Harris
Judge William Hazlett
Fred W. Heath
Clarence M. Heublein
Daniel M. Hidey
Wm. B. Himrod
Elmer H. Hoffman
G. D. Home
R. L. Horton
Judge Frederick W. Houser
Earl E. Howard
*Ray Howard
Wm. J. Hunsaker
John N. Hurt
Frank Hutton

Frank James
W. H. Jamison
Amelia Johnson
Maurice Jones, Jr.
Paul W. Jones
Wm. M. Jones
John A. Jorgenson

J. P. Keleher
*Caroline Kellogg
Hiram T. Kellogg
R. W. Kenny
Gerald C. Kepple
Earl D. Killion
G. H. King
*W. P. Kirksey
Saul S. Klein
Henry L. Knoop
Justin F. Kragh

May Lahey
*E. A. Lane
*Dana Latham
W. R. Law
E. O. Leake
Frank Lehan
Allan L. Leonard
Martin Levering
J. J. Lieberman
Joseph P. Loeb
E. O. Loucks
V. H. Lockwood
Lester O. Luce

R. C. McAllaster
*Judge Marshall F. McComb
E. J. McCully
D. H. McDougall
Claude H. McFadden
*J. Donald McGuire
Hugh McIsaac
*Judge Victor R. McLucas
*R. L. McNitt
Carey McWilliam
Archie McWilliams
J. B. Mandel
A. H. Mauer
Wm. DeF. Mann
W. W. Middlecoff
*E. J. Miller
John H. Miller
Lloyd O. Miller
William Robert Millar
*James E. Minds
Homer Mitchell
Howard T. Mitchell
Robert Mitchell
*Judge Chas. C. Montgomery
G. B. Morgan
F. B. Mullendore
Mildred Murphy
*Charles Murstein
*Ray L. Morrow

Thos. L. Nair
*Ezra Neff
Leo J. Neeson
*Nathan Newby, Jr.
*Vere Radir Norton
Scott L. Norveil

B. P. Oakford
Alford P. Olmstead
James H. O'Neill
Lawrence L. Otis
Eugene Overton

Isaac Pacht
Paul Palmer
Harry D. Parker
I. F. Parker
Wm. L. Pascoe
S. G. Pandit
Lyle Pendergast
*G. Roy Pendell
Louis P. Pink
L. H. Phillips
Edna Covert Plummer
*Judge James H. Pope
Frank M. Porter
D. M. Potter
Warner I. Praul
*Edmund W. Pugh
*R. H. Purdue
Miller G. Randolph
*Wm. P. Redmond
H. G. Redwine
Nowland M. Reid
Abe Richman
Thos. C. Ridgway
Wm. S. Robinson
Clifford A. Rohe
Judge Elias V. Rosenkranz
*Rugby Ross
I. R. Rubin
Frank Ryan
Milan E. Ryan

Harry G. Sadicoff
Maurice Saeta
R. B. Sammons
*Richard Hunt Sampson
*John W. Satterwhite
Norbert Savay
Henry Schaefer, Jr.
Judge B. Rey Schauer
Carl Schutz
*Jacob F. Schwartz
Dell A. Schweitzer
Vincent Scott
Clinton F. Seccombe
*J. B. Selters
Harry Sewell
A. L. Shepherd
Howard F. Shepherd
*Clement L. Shinn
E. A. Skinner
*Julius Smidt
*Arthur R. Smiley
*W. Cloyd Snyder
*M. C. Spicer
*Judge Joseph P. Sproul
Judge Dailey S. Stafford
*C. A. Stice
Arthur T. Stollmack
*Z. B. Stuart
Judge Carl A. Stutzman
L. J. Styskal
E. M. Swartz

*Judge Clair S. Tappaan
Courtney A. Teel
Chas. P. Temple
Herbert Terry
Catesby Thom
Edison Thomas
Will S. Tipton
Clyde C. Triplett
Oscar A. Trippet
Henry Trowbridge
*George C. Turner
*Judge Raymond I. Turney

*Frank G. Tyrrell
F. M. Tyrrell

Judge Dudley S. Valentine
Geo. M. Varnum
Frederick H. Vercoe
*A. H. Vernon
*Joseph W. Vickers
C. T. Vincent

*George E. Waldo
F. A. Walker
Charles D. Wallace
Ernest L. Wallace
John A. Wallis
George C. Watson
*Benj. T. Weinstein
John H. Wellman
*Ida V. Wells
John F. Westlund
Judge Myron Westover
*Erwin P. Werner
Sydney Wetzler
J. R. Wilder
*Judge Emmet H. Wilson
Melvin D. Wilson
Edward Winterer
*Sidney P. Wood
B. F. Woodard
Florence Woodhead
*Roland Rich Woolley
C. M. Wright
Earl E. Wright

Judge Leon R. Yankwich
*Robert Young

Golf Committee Announcement

DEL MONTE TOURNAMENT CANCELLED—Due to the press of trial work occasioned by the master calendar system, an insufficient number of attorneys are able to leave the city for the proposed golf tournament with the Northern California Lawyers' Golf Association at Del Monte, May 25, 26, and 27. Consequently, the Golf Committee has been forced to cancel the tournament.

JUNE TOURNAMENT AT GIRARD COUNTRY CLUB—As announced in the last issue of the BULLETIN, the regular monthly event for June will be held at Girard Country Club, Saturday afternoon, June 2. This tournament, which promises to be of unusual interest, is to be a three-way contest among the Golfing Doctors, the Golfing Dentists and the Golfing Lawyers, followed by dinner and entertainment at the new Club House of the Girard Country Club. HOLD JUNE 2 OPEN FOR THIS ENJOYABLE AFFAIR.

Deed of Trust Forms

A new form of Deed of Trust, just off the press, is announced by Title Guarantee and Trust Company, Fifth at Broadway, Los Angeles. In commenting upon this new document, J. F. Keogh, trust officer of the institution said today:

"Because of the fact that the Deed of Trust is coming into such widespread use, our organization has just produced a new and complete form which is the crystallization of our more than 30 years' experience in handling and specializing in these papers. We have had the privilege of acting as trustee under Deeds of Trust to secure promissory notes for tens of thousands of individuals throughout California. A disinterested trustee is always in a position to act impartially and justly for both sides—the lender and the borrower. Our latest approved Deed of Trust forms are furnished to the public without cost."

Case Note

Illegal Fixing of Resale Prices

In the case of J. W. Kobi Company v. Federal Trade Commission, 23 Fed. (2d) 41 (1927), the Commission directed J. W. Kobi Company to cease and desist from carrying into effect or attempting to carry into effect its policy of securing the maintenance of resale prices for its products by co-operative methods.

The Kobi Company filed its petition seeking to have this order reviewed. Before coming to the conclusion that the petition for review should be denied, the court examined a number of letters which petitioner had writtten in the course of its business. One of its letters to price-cutting customers was as follows:

"'In the few instances where it has been necessary to urge the price maintenance proposition with other customers, we have received voluntary assurance that our prices would not be cut by the distributor unless we were first notified. This arrangement seems very fair to us, and although we do not suggest that you take such action, we think possibly that you may wish to do so. We shall hope to hear from you again.'

"And another to the Royal Drug Company:

"'We will greatly appreciate your immediate assurance that you agree with our contentions and that you will comply with our request not to list Golden Glint or Golden Glint Shampoo at a lower quotation than $2 net.'

"And receiving no reply, they again wrote:

"'We are therefore returning your order and regret that we will be unable to fill it, until such time as you are prepared to furnish reliable assurance that you agree with our policies. A letter indorsing our suggestions and stating in detail what steps you have taken or are taking to carry them out will be carefully considered. Telegraphic advice of this kind will not be accepted.'

"Thereafter, when they received an order with the assurances that the prices would be maintained, they replied:

"'We have your letter of April 7 and thank you for the assurance that you will not cut the resale price of Golden Glint shampoo below $2.'

"And in a letter dated January 11, 1923, addressed to one of its customers, it wrote:

"'Our salesmen are reporting all deviations from the suggested resale price schedule that come to their attention. A number of jobbers have consented to cooperate in the same way. We would like very much to have your assurance that you will support us in our effort to do the fair thing by everybody. How about it?'

"And to another customer they wrote on May 15, 1923:

"'We note that you previously cut the prices in order to meet competition. In case a similar necessity should arise again, we will be very appreciative if you will send us the name of your price-cutting competitor. We feel that we can safely guarantee you against this sort of competition and will appreciate your co-operation as requested.'"

Concerning this method of doing business, the court, in upholding the order of the Federal Trade Commission, said:

"Letters of like character, showing a well-settled and determined plan to maintain resale prices and eliminate price cutters, is found in this extensive correspondence offered in evidence. It indicates clearly a dangerous tendency unduly to hinder competition, and to attempt to create a monopoly in its products, and it is a practice which it was the desire of the Clayton Act to prevent. Federal Trade Comm. v. Gratz, 253 U. S. 421, 40 S. Ct. 572, 64 L. Ed. 993. It comes well within the prohibition of an unfair method of competition in commerce which is declared unlawful. 38 Stat. 717 (15 U. S. C. A., Secs. 41-51). The basis of the condemnation of resale price fixing is the elimination of competition as represented by the prices among distributors of a product on which the resale prices were so fixed, and it has the danger of a distinct monopolistic effect. Toledo Pipe Threading Machine Co. v. Fed. Trade Comm. (C. C. A.) 11 F. (2d) 337; Fox Film Corp. v. Fed. Trade Comm. (C. C. A.) 296 F. 353."

REUEL L. OLSON.

Book Reviews

HARRY GRAHAM BALTER *of the Los Angeles Bar*

Lecturer in Law at the College of Law, Southwestern University

REAL ESTATE TITLES AND CONVEYANCING; by Nelson L. North, Lecturer on Real Estate, New York University and American Institute of Banking; and DeWitt Van Buren, Lecturer on Real Estate, New York University, Manager, Maintenance of Plant and Records, Title Guarantee & Trust Co., Brooklyn, N. Y.; 1927; X, 719 p.; Prentice-Hall, New York. *Price* $6.00.

In these days of escrow departments, title insurance, and title guarantee companies, with their highly specialized staffs of experts, the average owner of real estate, and even the average lawyer, knows next to nothing about the actual mechanics by means of which a transfer of title to a piece of realty is effected. If all goes well, this lack of knowledge by buyer and seller leaves them no worse off, but when a "jam" occurs and difficulties arise, it would probably in no way be harmful to buyer or seller or lawyer, if each knew a little something about what was going on behind the swinging doors that open the way into the vast unknown of the title company's "plant."

Real Estate Titles and Conveyancing is an attempt to give the non-expert a picture of what goes on behind those swinging doors. We are told in a non-technical but accurate manner about Descriptions, Land Surveys, Transfer of Title, Recording Acts, Recording Offices, Abstracting and Examinations of Title, Report of Title, The Abstractor and Title Examiner, Title Insurance, Preparation and Closing of Title, and Escrows.

This is not a law book; an attempt is made to avoid legal phraseology, yet a good part of the work presents the legal side of conveyancing, although in a somewhat elementary and non-technical manner. So we have a discussion of Development of Real Property Ownership, Land and its Constituents, and Rights and Interests in Land. Two especially helpful chapters deal with Real Estate Title Actions and Real Estate Contract Law Suits. These chapters do not present the law in a manner helpful to the lawyer. To him the contents of these chapters are elementary. But what is lacking in citations of authorities and legal technicalities, is made up by the simplicity and clearness of the exposition.

The three chapters on Illustrations of Sale, Illustrations of Exchange, and Illustrations of Mortgage Loan are interesting innovations. Each "Illustration" presents a "statement of facts," followed by a vivid word picture of the exact steps that the parties take to consumate the particular deal under discussion

More than half of the book is taken up with Forms of Real Estate instruments. Illustrative types of instruments ordinarily used in a real estate transaction, are listed by States, so that similarities and differences may be analyzed.

The modest belief of the authors expressed in the following excerpt from the

preface to the volume is well substantiated by the honest merit of this work.

"The authors for many years have been engaged in real estate law practice and the examination of titles. They have also been instructors in these subjects. They have long felt the need of a book which, with as little technical legal phraseology as possible, would simplify and clearly discuss and clarify the origin and fundamentals of land titles, the searching and abstracting of title, and the forms and procedure in real estate transactions. With said end in view, this volume was prepared. It will be found of help to the title man in his work, to the dealer in real estate in his transactions, to lawyers and title men on title closing, and as a textbook for the use of students."

EQUITABLE CONVERSION

(Continued from page 12)

vendor's right to compel performance on the part of the intending purchaser under the contract."[49]

As stated by the court, its opinion in the Conlin case is based on Smith v. Phoenix Insurance Company, which in turn was grounded on the Massachusetts case of Wells v. Calnan. As already noted the doctrine as to risk of loss was not involved in the Calnan case.[50] Nor was the risk of loss an issue in the Smith case. The California District Court of Appeal stated the issue in the Smith case to be: "It was justly held that Stewarts' possession was that of a tenant. No other conclusion could have been reached in view of the express terms of the instrument devising the property to Stewart for the term of five years at a fixed rent payable monthly, with the provision that 'said party of the second part *may at any time* during said term of five years purchase said hotel,' etc. . . . In reference to the latter clause the court said: 'In considering the question before us, we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it, even if it remained whole and intact.' It was further held that the possession of the property by Stewart was with the implied consent of the insurer."[51] Smith was suing for loss under a policy insuring the property and the defense was a breach of the clause against "change of title or possession." The court held the option to purchase was not a "change of interest' under the policy and the defendant had consented to the leasing of the property for hotel purposes. The plaintiff recovered, under the policy.

Another fact may be noted in connection with the Conlin case. It is questionable whether the vendor could give a "marketable title" at the time of the rescission by the vendee. Not only was there an unsatisfied mortgage, but the destruction of the official record had rendered the title defective within the meaning of such contracts.[52]

Cooper v. Huntington[53] is another action brought by a vendee asking for the rescission of a contract to purchase land together with certain water rights. The water rights had proved worthless and four acres of the ten covered by the contract had been washed away by a flood. The court granted a rescission. This was affirmed on appeal. The opinion cites the Conlin case. It should be noted, however, that before citing the case the court had said that because of misrepresentations as to the water supply the vendee had a right to a rescission of the contract.

A recent resurrection of the dictum is found in Ogren v. Inner Harbor Land Company.[54] The defendant executed a sale contract with the plaintiff, therein agreeing to sell to the latter a certain lot in the Inner Harbor Tract of Long Beach. Thereafter the Los Angeles county flood control district instituted condemnation proceedings against the defendant and others, but without joining the plaintiff, by virtue of which proceedings the district acquired possession of a large tract of land, including the land

[49] At 665, 666, 120 Pac. 755 (1911).

[50] *Supra* note 40.

[51] Finkboner v. Glenn Falls Ins. Co., 6 Cal. App. 379, 384, 92 Pac. 318 (1907).

[52] Crim. v. Umbsen, 155 Cal. 697, 103 Pac. 178 (1909); Allen v. Globe, etc., Co., 156 Cal. 286, 104 Pac. 305 (1909).

[53] 178 Cal. 160, 172 Pac. 591 (1918).

[54] 53 Cal. App. Dec. 313, 256 Pac. 607 (1927).

in question. The plaintiff brings this action to rescind. The District Court of Appeals in affirming a judgment of rescission cites again with approval the Conlin case. It says: "We know of no case in this jurisdiction directly in point, but several decisions involve a determination of the relative rights of parties to a contract where performance has been excused through the intervention of an irresistable superhuman cause, such as is specified by section 1511 of the Civil Code.[55] Where buildings upon property contracted to be sold, but remaining in the possession of the vendor, are destroyed by fire the latter may rescind and secure the return of what he shall have paid on the contract. (Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755; Smith v. Phoenix Insurance Co., 91 Cal. 323, 27 Pac. 738)."

There was no loss here. The fund to pay for the land was available to either the plaintiff or defendant. The defendant could not specifically enforce the contract because he could not give title.[56] The court rightly said the Conlin case was not in point and the analogy is questionable.

No criticism is intended to be made of the decisions in the cases discussed. They are, it is believed, correctly decided on their respective facts. The suggestion made is only that, disregarding the loss, the vendor was not entitled in any of them to a decree for specific performance. If this deduction be admitted, the doctrine of equitable conversion was in no way involved.

[55]Cal. Civ. Code, §1511: (The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: (1) When such performance of offer is prevented or delayed by the acts of the creditor, or by the operation of law. . . ."

[56]Cornell v. Andrews, 35 N. J. Eq. 7, *aff'd*, 36 N. J. Eq. 321 (1882).

The Results of Advertising

While advertising by an attorney is considered unethical, it assuredly brings results. The following letter, which found its way by a devious path into the office of the editor, is an effective illustration:

Los Angeles, Calif., April 1, 28.

Kemper B. Campbell, Atty.,
Los Angeles, Calif.,

Dear Sir:

Six months ago, I answered an add. in my Farm Magazine, which read;

"Send one dollar and we will send remedy to cure horses of slobbering."

I sent them a dollar and got this reply; "Teach your horse how to spit."

Now I would like to employ the Attorney whose add., I am enclosing, to get my dollar back and am willing to exchange for such service an old female rabbit, who is too old to breed, but I dont want to get skinned out of my Doe. If something has to be skinned, it would be just as cheap to skin the old Doe and put an end to the matter. But I want you to read the add. taken from the "Swap Column" of the *Examiner* of April 1, 28,

> ATTORNEY'S services offered in exch. for what? Box C-41126, Examiner.

If you think the Attorney(?) will be able to help me get my dollar back, kindly write me postage collect.

Yours truly,

Steve B. Capps,
542 Millstream Ave.,
Los Angeles, Calif.